

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
T-MOBILE NORTHEAST, LLC
and
WILDLIFE ACHIEVEMENT CLUB
CHAPTER OF THE IZAAK WALTON
LEAGUE OF AMERICA**

Petitioners

Michael McGarity

Hillorie Morrison

Curtis Jews

For the Petition

Sean Hughes, Esquire

Attorney for Petitioners

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Board of Appeals Case No. S-2780
(OZAH No. 11-07)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2780, was filed on September 28, 2010, by T-Mobile Northeast LLC and the Wildlife Achievement Club Chapter of the Izaak Walton League of America. Petitioners seek a special exception, pursuant to §59-G-2.58 of the Zoning Ordinance, to construct an unmanned wireless telecommunications facility on a 150-foot tall monopole topped by a 4 foot lightning rod, and an associated equipment area, at 26430 Mullinix Road, Mt. Airy, Maryland.

The site is on land owned by co-applicant Wildlife Achievement Club. The subject site is in the RDT Zone, which permits telecommunications facilities by special exception. This case will be decided by the Board of Appeals in conjunction with a request for an administrative modification of the existing special exception, S-570, on the site.¹ Exhibit 19.

The Montgomery County Transmission Facility Coordinating Group (TFCG), also known as the “Tower Committee,” reviewed the application, and on August 6, 2009, recommended approval of the facility, conditioned upon the applicant obtaining a special exception from the Board of Appeals. Exhibit 12.

On October 1, 2010, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on January 14, 2011. Exhibit 20. Technical Staff at the Maryland-National Capital Park and Planning Commission, in a report issued January 4, 2011, recommended approval of the special exception (Exhibit 22).²

A public hearing was convened as scheduled on January 14, 2011, and Petitioners called three witnesses. There were no other participants at the hearing, which concluded on the same day.

¹ On March 16, 1971, the Board of Appeals (BOA) approved special exception CBA-2973, granting co-applicant Wildlife Achievement Club permission to construct and operate a private club and outdoor rifle and skeet shooting range on the Wildlife Achievement Chapter property. The BOA granted modifications of CBA-2793 in December 1974 and April 1975. The Board granted further modifications of the special exception, in BOA Case No. S-570 in 1977, 2001 and 2010. The Wildlife Achievement Chapter requests that the Board further modify special exception S-570 to permit the development of the subject telecommunications facility.

² The Technical Staff report is frequently quoted and paraphrased herein.

At the beginning of the hearing, the Hearing Examiner raised the question of whether the application was timely filed because the Tower Committee approved the matter on August 6, 2009, but the file had indicated that the special exception application wasn't filed until September 28, 2010. Zoning Ordinance 59-G-2.58(a)(11) requires such filing within one year after approval of the Tower Committee. Petitioners asserted that they had filed this special exception application for the telecommunication facility on, and it was accepted on, August 5, 2010 (*i.e.*, within one year of Tower Committee approval). Tr. 7-11 and Exhibit 23. The issue was ultimately cleared up by an e-mail from Katherine Freeman, Executive Director of the Board of Appeals, indicating that the Board of Appeals staff considered the application to be filed on August 5, 2010. Exhibit 42.

The record was held open until February 7, 2011, so that Petitioners could file a minor revision to the Site Plan, altering the fence from a chain link to a board-on-board fence, and submit it to Technical Staff for its review. Tr. 13. The revised Site Plan (Exhibit 44) was timely filed.

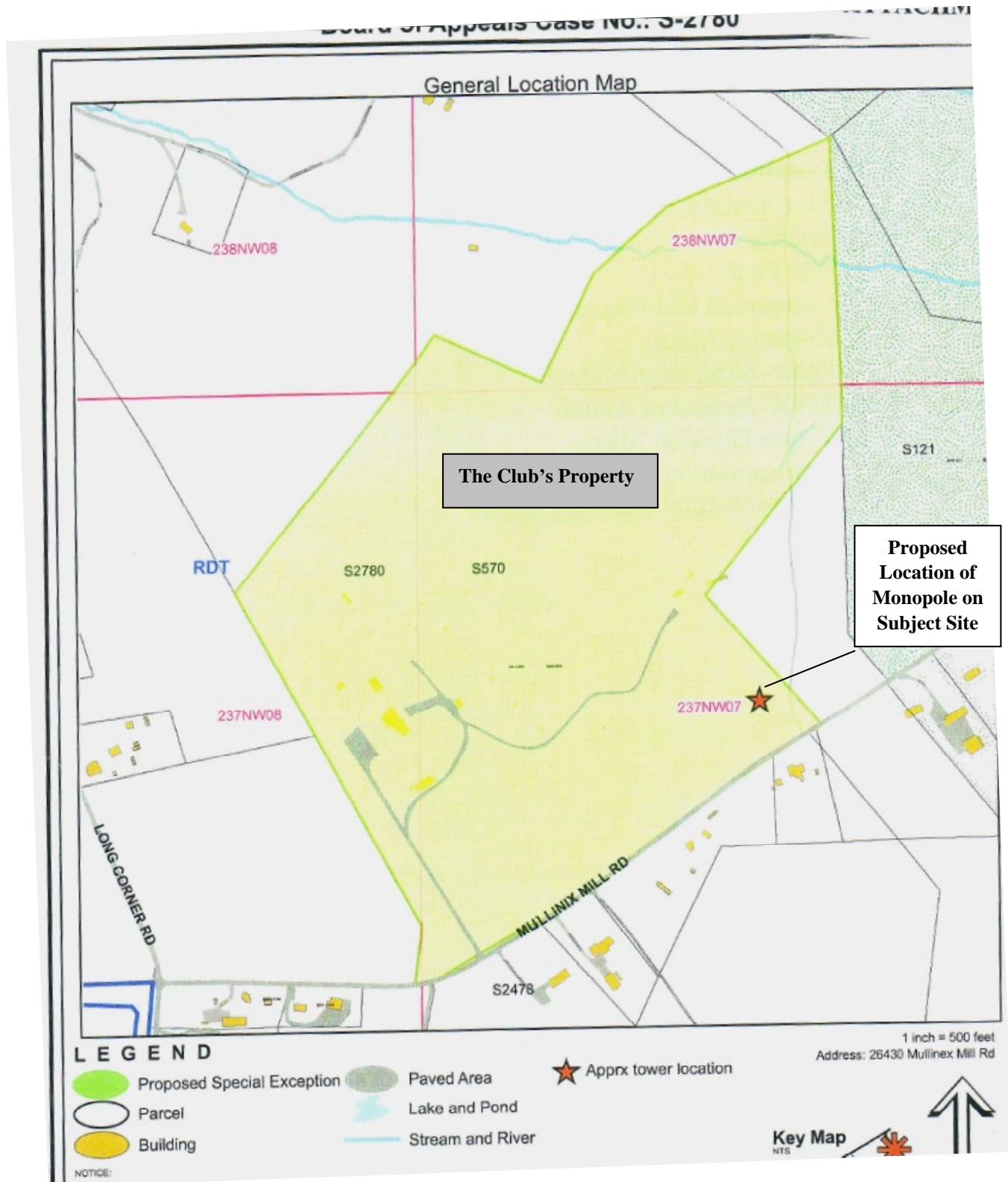
The record closed, as scheduled, on February 7, 2011, and the petition remains unopposed. As will appear more fully below, Petitioners have met all the requirements for the special exception they seek, and the Hearing Examiner recommends that it be granted, with conditions specified in Part V of this report.

II. FACTUAL BACKGROUND

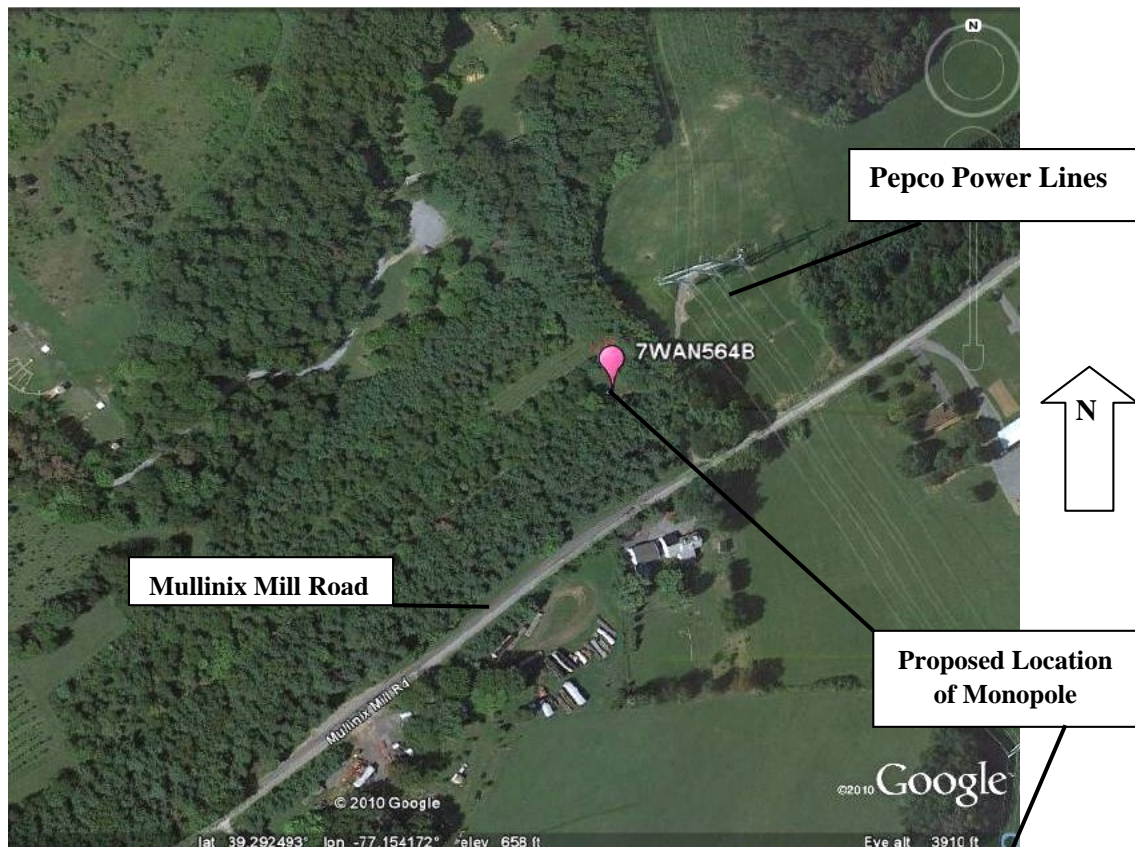
A. The Subject Property and the General Neighborhood

As noted above, the address of the subject property is 26430 Mullinix Road, Mt. Airy, Maryland. The special exception site is located on an 85.7-acre property (Parcel P333) owned by co-Applicant, Wildlife Achievement Club Chapter of the Izaak Walton League of America, Inc. (Wildlife Achievement Club). The Club's property is an irregularly shaped lot in the RDT zone, and there are many large, mature trees located on it. The proposed facility will be located approximately 236 feet northwest of Mullinix Mill Road in a cleared area, as shown in the following location map

supplied by technical staff (Exhibit 22).



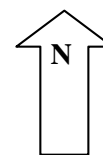
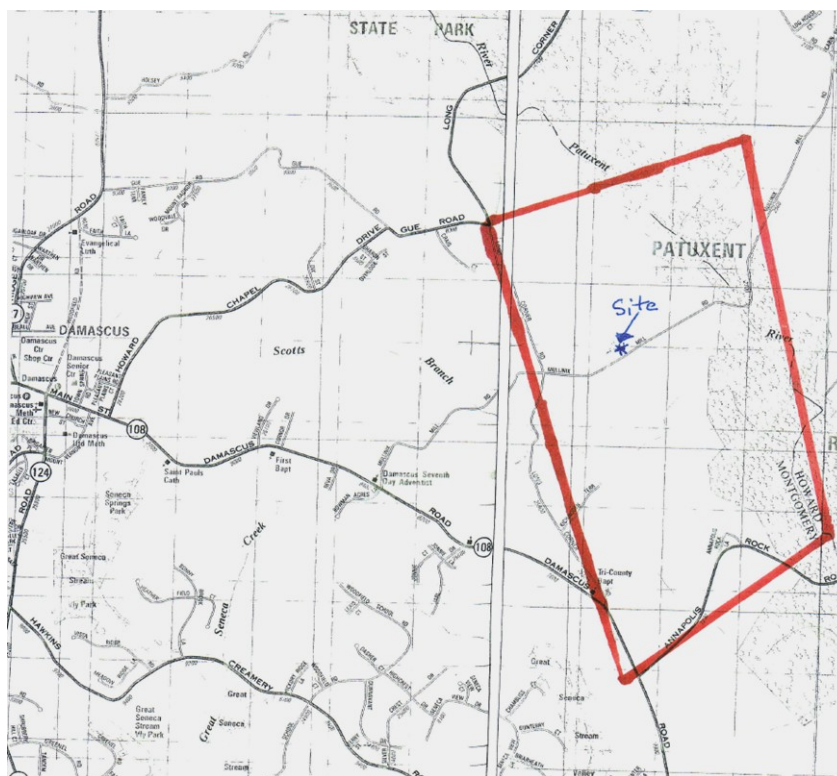
The site is also depicted in an aerial photograph (Exhibit 26(b)), and a ground-level photograph of the cleared area where the compound will be located (Exhibit 27(a)). The existing water tank in the picture will be removed. A yellow flag denotes the proposed location of the cell tower.



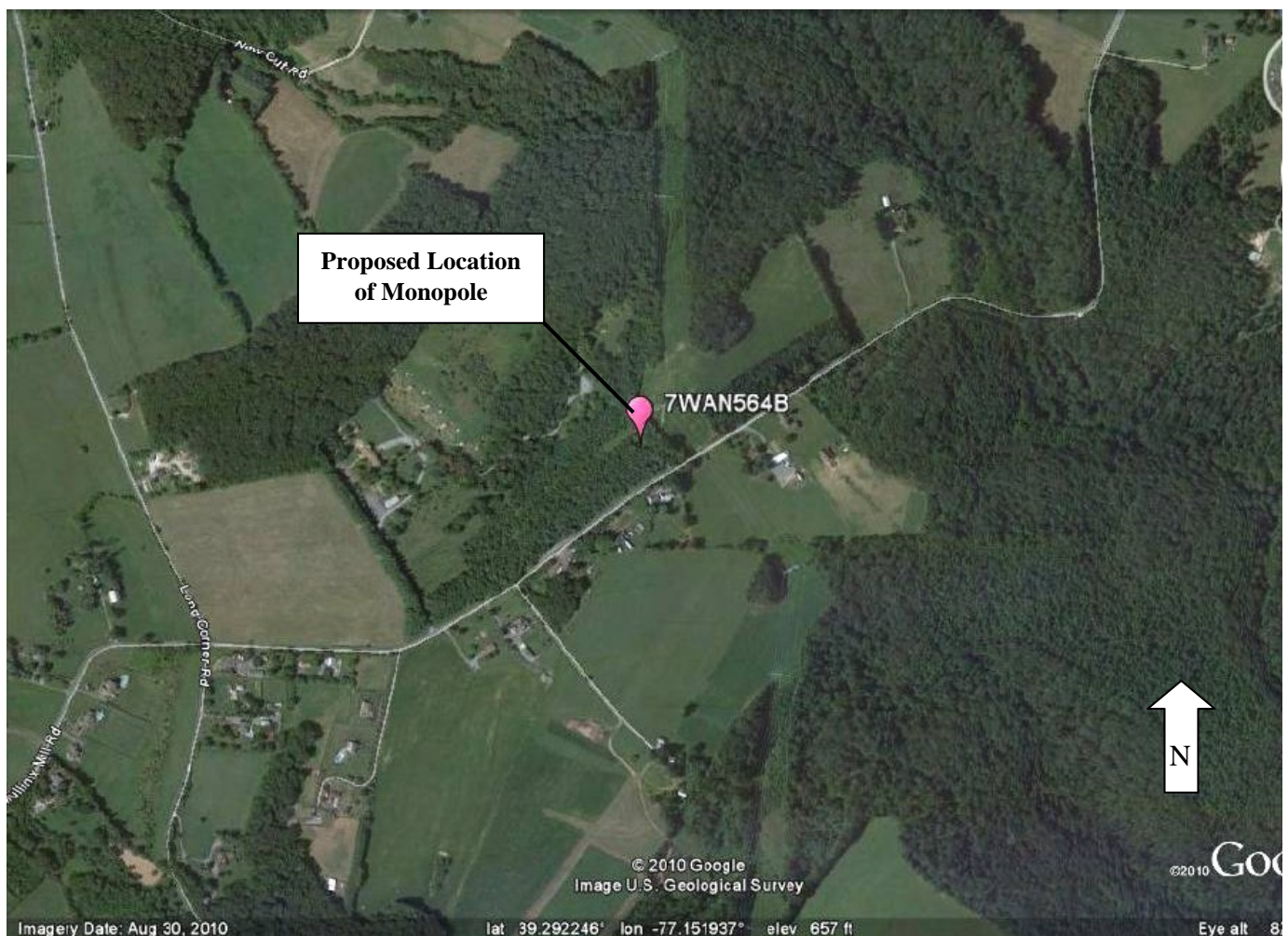
There is an existing gravel access road that leads up to the Pepco right-of-way, where there are three existing Pepco transmission towers 200 to 300 feet northeast of the site. Tr. 20-21.

T-Mobile will be using an existing entrance to the site off of Mullinix Mill Road as its access to the proposed tower site, which it has leased from Wildlife Achievement Club. Exhibit 11. The site will consist of a 2,500 square-foot, fenced compound (50 feet by 50 feet), which will contain the monopole and associated equipment. There will be an extension built off of the existing drive to access the area where the proposed tower will be. The proposed tower site is in a partially cleared area, surrounded on all sides by mature trees. Tr. 23. Technical Staff reports that the land is relatively flat; the site is exempt from submitting a forest conservation plan under Chapter 22A-5 of the County Code; and “Construction and operating the wireless telecommunication facility is entirely outside of all environmental[ly] sensitive areas.” Exhibit 22, Attachment 11.”

The properties bordering 26430 Mullinix Mill Road are farms and forested land. It is a rural area. Technical Staff defined the general neighborhood as “generally bound by Gue Road to the north, Patuxent River to the east, Long Corner Road to the west and Annapolis Rock Road to the south.” Exhibit 22, p. 2. The area is depicted below in a map from the Staff report:



Petitioners did not dispute this definition the general neighborhood, and the Hearing Examiner accepts it as well. According to Technical Staff, the property is generally surrounded by low-density, single-family detached homes that front on Mullinix Mill Road and open agricultural land. Properties surrounding the subject property are zoned RDT. There are no other special exceptions in the vicinity of the subject property. The area is depicted in an aerial photograph supplied by Petitioners. Exhibit 26(a).



B. The Proposed Use

The proposed use is an unmanned wireless telecommunications facility, with a 150-foot monopole, topped by a 4 foot lightning rod. The monopole and related equipment will be contained

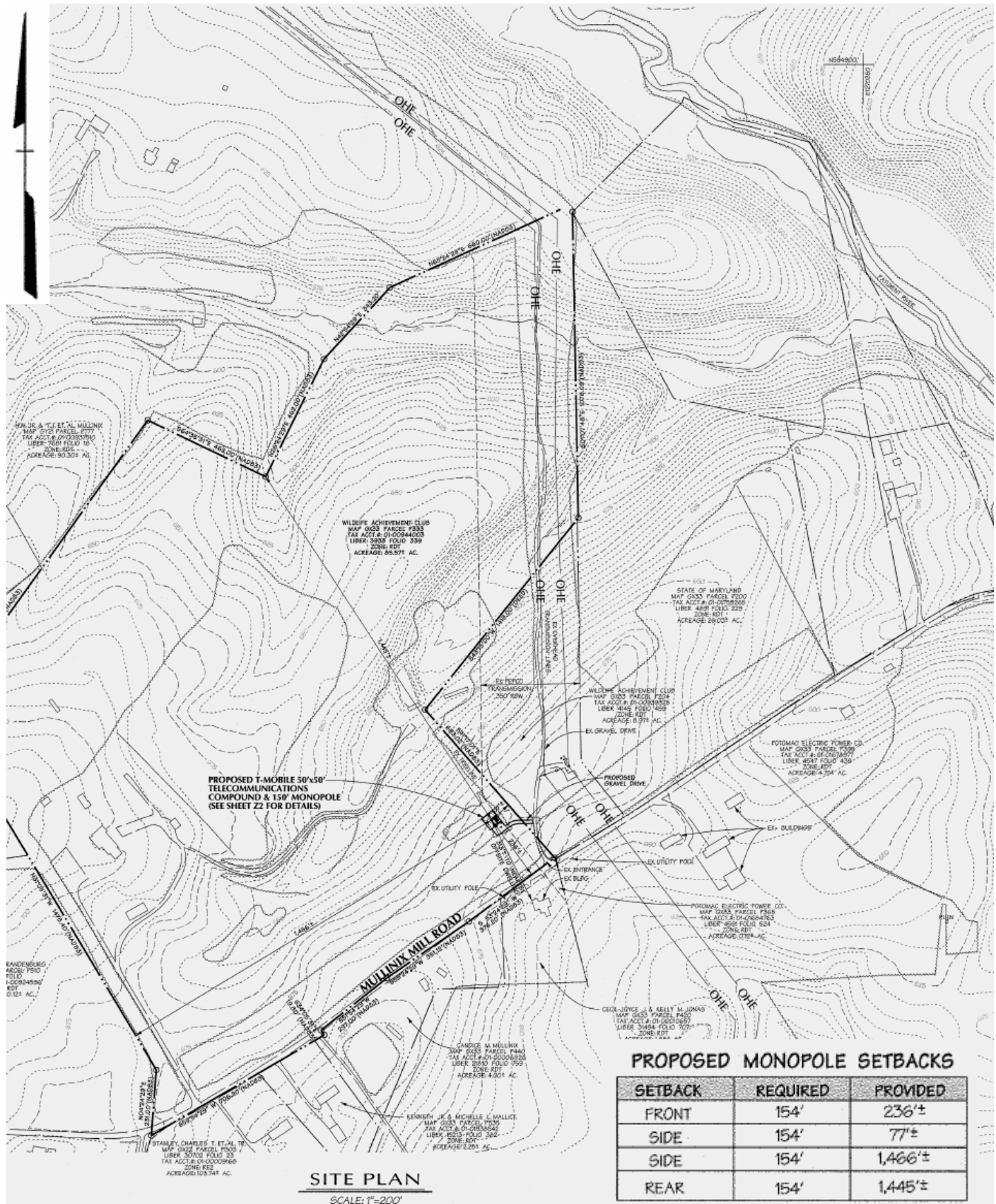
within a 2,500 square-foot fenced compound (50 feet by 50 feet). Two radio base station equipment cabinets will be placed on a 10 foot by 20 foot concrete pad within the proposed compound. The proposed equipment cabinets measure approximately 63 inches high, 51 inches wide, and 37 inches deep. A third cabinet may be added in the future. Tr. 62. In fact, the site plan ((Exhibit 44, page 2) indicates space for three additional future cabinets and a PPC (Power Protection Cabinet) on the concrete pad. Also within the compound, but not on the concrete pad, will be a transformer and a proposed "Mesa" cabinet, both of which are part of the equipment used by the facility. The two-page site plan (Exhibit 44) is reproduced below and on the following pages.

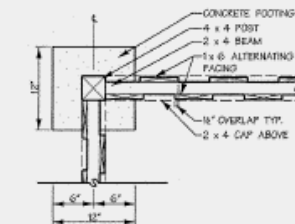
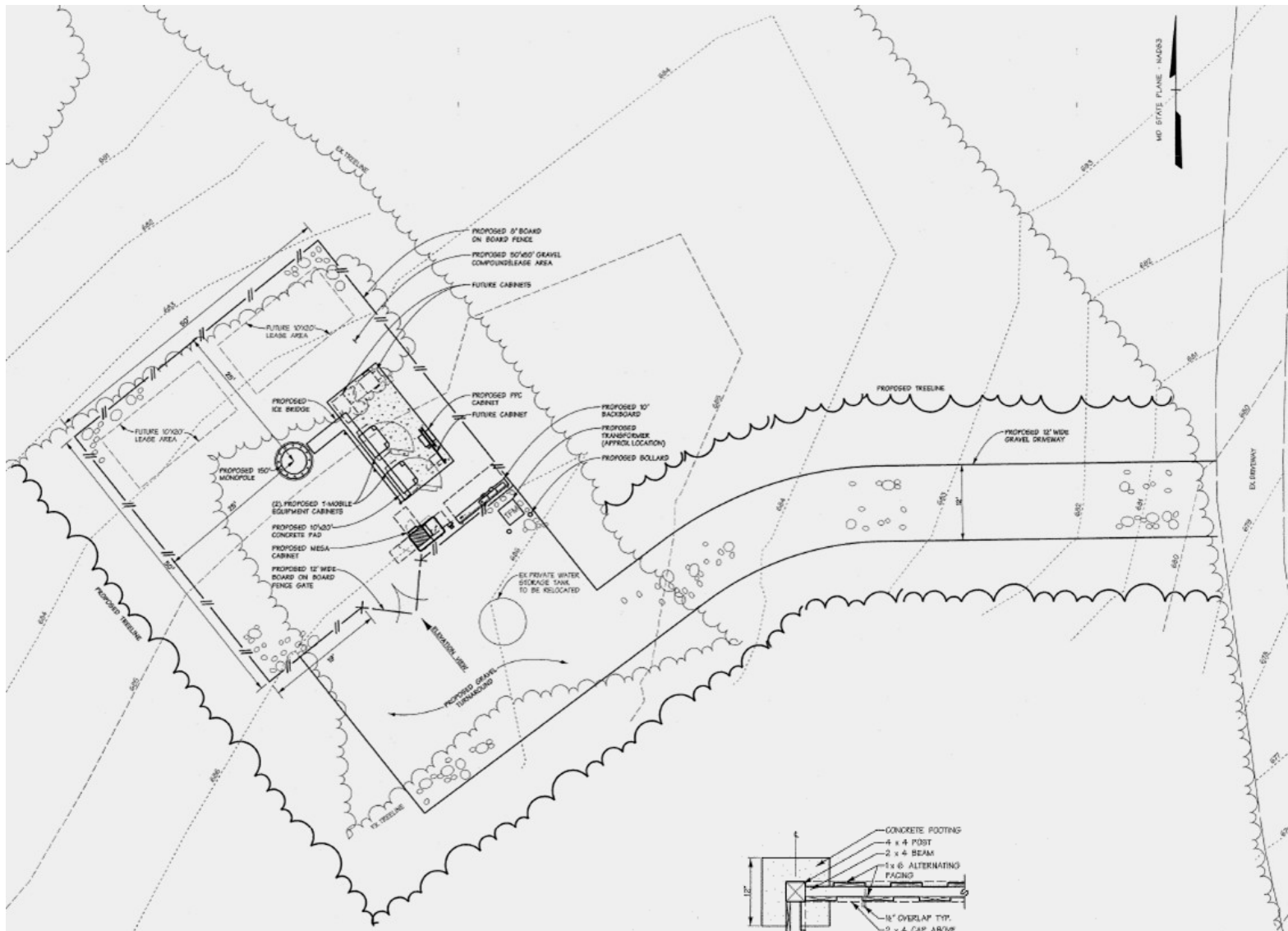
GENERAL NOTES

1. Current Owner: Wild Life Achievement Club
Chapter of the Issac Walton League of Amer
P.O. Box 118
Damascus, MD 20872
2. Contract Lessee/Applicant: T-Mobile Northeast LLC
12050 Baltimore Avenue
Beltsville, Maryland 20705
3. Site Area: 85.57 acres = 3,727,429.2 sq. ft.
4. Existing Use: Exempt Commercial
5. Site Address: 26430 Mullinix Mill Road
Mt. Airy, MD 21771
6. Site Data: Tax Map GX33 Parcel P333
Deed Reference: 3933/339
Tax Account Number: 00944003
Election District: 12
Zone: RDT
7. Proposed Monopole Location:
Latitude: N 39°17'33.87" (NAD 83)
Longitude: W 77°09'10.67" (NAD 83)
Ground Elevation: 684.7± AMSL (NAVD 88)
Proposed Monopole Height (with lightning rod): 154'± AGL
Total Proposed Monopole Elevation: 838.7± AMSL (NAVD 88)
8. The topographic information shown hereon, in the area of the proposed improvements, is taken from a topographic survey performed by DMW, Inc on 7-9-09. The topographic information shown hereon, outside the area of the proposed improvements, is taken from Montgomery County digital GIS. Boundary information shown hereon is based upon a deed recorded among the land records of Montgomery County, Maryland in Liber 3933, Folio 339, together with field located evidence and rotated to meet the Maryland Coordinate System NAD-83(1991). This plan is not the result of a DMW boundary survey and, therefore, is subject to change. This plan is subject to all easements and restrictions either recorded or unrecorded and may or may not be shown hereon. The planimetric information shown on this plan is based in part on copyrighted GIS Data from M-NCPPC, and may not be copied or reproduced without express written permission from M-NCPPC
9. No water or sewer utilities are required for the proposed installation.
10. No tower lights are proposed for this facility, unless required by the Federal Aviation Administration.
11. Existing utility location information shown on these plans is for the contractors convenience only. While the information shown has been gathered from surveys and sources deemed to be reliable, the correctness or completeness of the information shown is not warranted or guaranteed. The contractor shall verify all information to his own satisfaction.
12. The contractor is to notify Miss Utility (800)-257-7777 a minimum of 3 working days prior to any construction or excavation. The contractor is to also notify a private utility contractor for all on-site utility locations.
13. The proposed compound location is not located within a 100 year flood plain as per the National Flood Insurance Program, flood insurance rate map community panel number 24031C0070D revised September 29, 2006.
14. Proposed work includes the installation of a proposed 50'x50' graveled and fenced telecommunications compound which will include a MESA cabinet, a 10' electric backboard, a 10'x20' concrete pad that will include (2) proposed (+3 future) equipment cabinets, and a ppc cabinet at the base of a proposed 150' monopole. (6) proposed (+3 future) antennas are to be mounted on the proposed monopole at a centerline height of 147'± AGL. An electric transformer protected by bollards will be installed outside of the proposed compound. A 12' wide gravel access road will be constructed from the ex. driveway to the proposed compound.
15. Required number of employees: 0 (unmanned facility)
16. Required number of parking spaces: 0 (unmanned facility)
17. Ground disturbance for this telecommunications facility is limited to 5,133± s.f.
18. The applicant shall provide a certification from a registered engineer that the structure will meet the applicable design standards for wind loads of the Electronic Industries Association (EIA) for Montgomery County.
19. Zoning information shown hereon is provided by Montgomery County as shown on www.mcmmaps.org.
20. The proposed compound is not within the Chesapeake Bay Critical Area.
21. If the monopole is no longer used for telecommunications purposes for a continuous period of one (1) year, it shall be removed by the facility owner at the owner's expense.
22. Communication tower shall be grey or a similar color that minimizes visibility, unless a different color is required by the FCC or FAA.
23. The monopole will be identified by a sign no larger than 2 square feet and fixed to the support structure or equipment shelter. The sign shall identify the owner and maintenance service provider of the support structure or any attached antennas and provide the telephone number of a person to contact regarding the structure. The sign will be updated and the Board of Appeals notified within 10 days of any change in ownership.
24. There will not be any outdoor storage of equipment or other items, except as provided by these plans and approved by the county.
25. The owner of the telecommunications facility shall maintain the telecommunications facility in a safe condition.

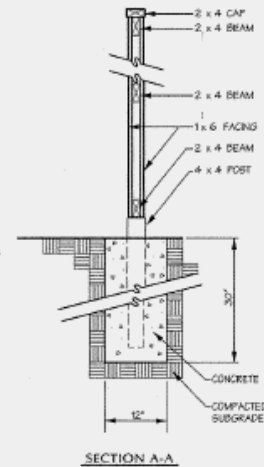
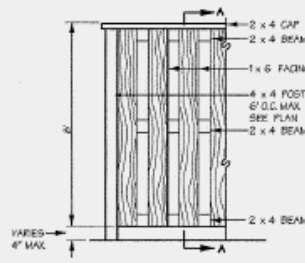
PROFESSIONAL CERTIFICATION

I HEREBY CERTIFY THAT THESE DOCUMENTS WERE PREPARED OR APPROVED BY ME, AND THAT I AM A DULY LICENSED PROFESSIONAL ENGINEER UNDER THE LAWS OF THE STATE OF MARYLAND, LICENSE NO. 38633 EXPIRATION DATE: 5-14-12



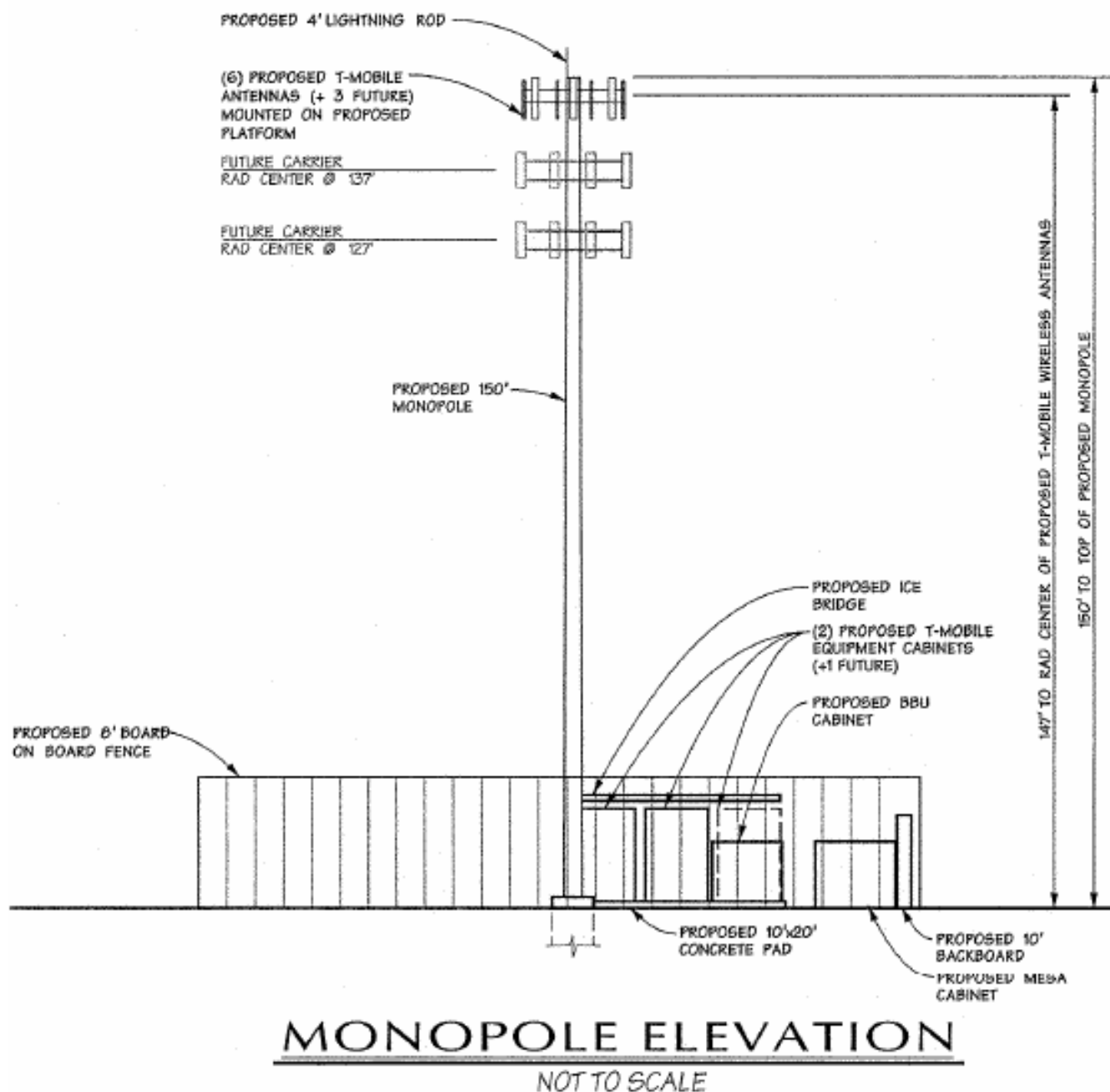


NOTE: CONTRACTOR TO USE 2" GALVANIZED SCREENS FOR ATTACHING SLATS TO POSTS AND BEAMS



TYPICAL BOARD ON BOARD FENCE DETAIL

NOT TO SCALE



As shown, panel antennas will be mounted outside of the monopole at a centerline height of approximately 147 feet. Exhibit 44. The proposed facility will be constructed with sufficient capacity to hold the antennas of at least two other communication carriers (co-locators) in addition to the antennas of T-Mobile. Exhibit 22, p. 2.

The equipment compound will be surrounded by an eight-foot tall board-on-board fence.

Although the facility will be unmanned, it will be in continuous operation 24 hours per day. The only visits to the site will be for emergency repairs or regularly scheduled maintenance visits one or two times per month. There will be no lighting at all on the facility except an emergency lamp attached to one of the equipment cabinets for a technician to service it in the dark. Tr. 45.

The proposed monopole will not be lighted and will contain no signage except a sign no larger than 2 square feet affixed to the support structure or equipment shelter to identify the owner and maintenance service provider, as required by Zoning Ordinance §59-G-2.58(a)(8). In addition to the fence, the equipment compound will be screened by very tall, thick mature trees in the area and will be set back 236 feet from the nearest public road.

Zoning Ordinance §59-G-2.58(a)(2)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of 300 feet from the nearest off-site dwelling, which is met by a 313-foot setback in this case. In addition, Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the total height of 154 feet for the cell tower and lightning rod, a 154 foot setback from each property line is required. This setback is easily met on three sides: it is 236 feet from the southern property line; 1,466 feet from the western side property line; and 1,445 feet from the northern (rear) property line. However, the minimum setback will not be met on the eastern side.

Applicants are seeking a reduction of the setback requirements, pursuant to Section 59-G-2.58(a)(1)(D), to allow the cell tower to be erected 77 feet from the eastern property line, instead of the required 154 feet. As explained by Applicants, the cell tower was not sited to meet the eastern setback requirements for three reasons: to get it closer to the existing tree line for better screening purposes; to get it closer to the existing transmission towers that are approximately 250 feet northeast of the site; and to reduce the disturbance of existing trees on the property in that vicinity. Tr. 23-24.

The Board of Appeals is authorized by Zoning Ordinance §59- G-2.58(a)(1)(D) to reduce the setback requirement to not less than the building setback of the applicable zone³ if the applicant requests a reduction; and “evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.”

Technical Staff supports the setback reduction because the proposed location of the monopole will help it blend in with the existing line of Pepco transmission towers adjacent to the property. As noted by Staff, “these site conditions make this location less visually obtrusive.” Exhibit 22, p. 9. The Hearing Examiner agrees with this sensible observation, and there is no evidence to the contrary record. In fact, the owner of the adjacent property to the east is the co-applicant, Wildlife Club, which indicated by letter (Exhibit 28) that it did not object to the reduced setback requested by T-Mobile.

The equipment shelters house the electronics for the structure and backup batteries. T-Mobile will use a NorthStar battery. The EPA classifies NorthStar NSB 100-FT battery as spill proof. Exhibit No. 37 is the specifications sheet for NorthStar batteries. Exhibit No. 36 is a fact sheet that describes the chemical safety information with regard to the radio base station cabinets used in T-Mobile sites. It states that T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. According to T-Mobile’s statement, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment throughout an extreme range of operating conditions. Hillorie Morrison, who acts as T-Mobile’s agent for purposes of zoning, testified that T-Mobile commits to filing a hazardous substances registration for this site in

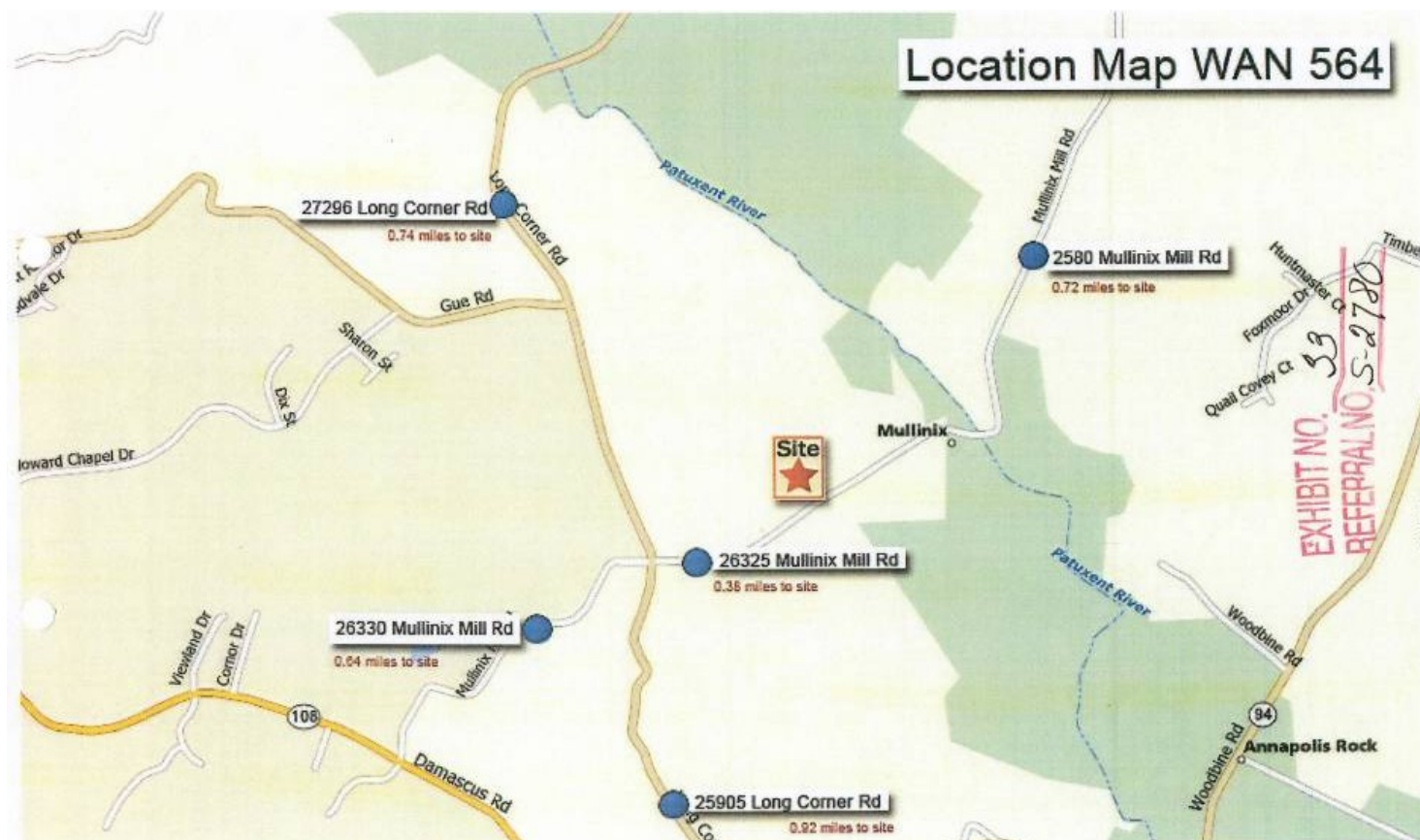
³ The minimum side yard building setback in the RDT zone is 20 feet. Thus, the proposed 77 foot setback easily meets that minimum.

accordance with applicable regulations. Tr. 57-61.

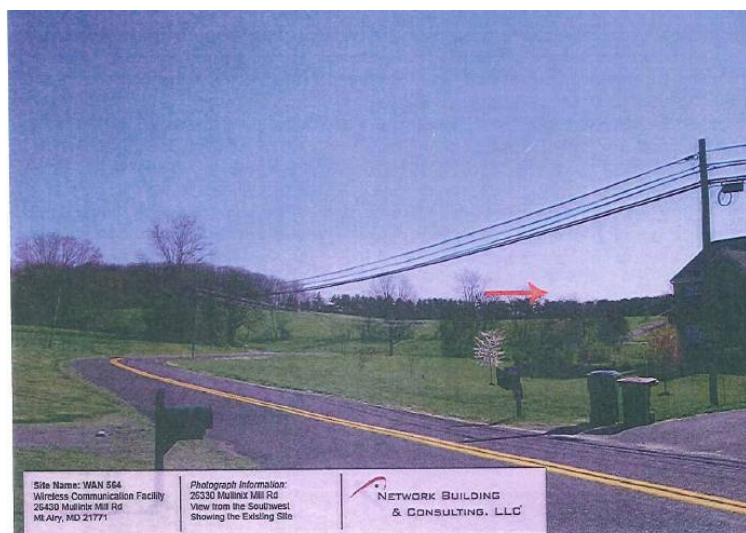
C. Impact of the Proposed Facility on the Neighborhood

The most significant issue regarding a telecommunications facility in an agricultural zone is its potential visual impact upon the neighbors and the rural vista. For the reasons explained below, the Hearing Examiner finds that the proposed monopole will not be a visual nuisance to the neighborhood, nor unduly impinge upon the rural vista.

Ms. Morrison testified that when T-Mobile erects a new monopole, it does a visual test, using a balloon (about two feet in diameter) raised to the height of the proposed monopole. T-Mobile then simulates what the actual monopole would look like based on the 150 foot height and the style of the pole. Visibility was examined at various points around the site, and photographs of the site were taken from these points, at the locations designated on the following map (Exhibit 33). Tr. 46-54.



The tag, WAN-564, pertains to this particular transmission tower. The red star in the center shows the location of the monopole based on its coordinates. The various blue dots show the points where Ms. Morrison stood to take the pictures, and looking towards the site, underneath in red, it shows how far that point is from the site. The following photographs on the left depict the site as it exists, viewed from the locations indicated on the photographs, and the photographs on the right depict the site as one would see it with the proposed monopole erected. They all illustrate the same thing, that while the pole would not be invisible, there is very little real change to the view because of the trees and because of the Pepco transmission towers that are already in the sight line. Tr. 46-54.





Technical Staff made the following comments regarding visibility of the proposed monopole (Exhibit 22, p. 5):

While height and visual impact tend to be inherent adverse effects commonly associated with telecommunications facilities, the proposed facility minimizes any such concerns given that the 150-foot tall structure will be sited on the property approximately 236 feet from Mullinix Mill Road and is surrounded by tall trees. The location of the proposed facility on the approximately 86-acre property relative to the surrounding neighborhood is such that it is sufficiently separated and screened from the nearest residential properties to the north, east, and south.

Staff also noted that the proposed monopole will not have other adverse effects on the community (Exhibit 22, pp. 5-6):

As noted, the proposed facility will be unmanned and therefore, there are no significant transportation impacts that would result from the proposed special exception. There are no discernible noise related impacts associated with the proposed use. The size, scale and scope of the proposed use are not likely to result in any traffic disruption, light intrusion or any other environmental impact. There are no non-inherent adverse effects sufficient to justify a denial of the requested special exception.

The issue of the impact of the proposed monopole on rural vistas is discussed in the next section of this report, in connection with the applicable master plan.

Finally, T-Mobile asserts in its Statement in Support of this application (Exhibit 3(a), p. 1), that “T-Mobile holds a license issued to it by the Federal Communications Commission (“FCC”) to provide personal communication service (“PCS”) throughout the greater Baltimore-Washington, DC metropolitan areas, including all portions and sections of Montgomery County, MD.” Petitioners’ radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license regarding radio frequency emissions. Tr. 81.

The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

The Hearing examiner finds, based on the uncontroverted evidence, that the proposed use, though it will be visible from some vantage points, will have no non-inherent adverse effects on the surrounding community.

D. The Master Plan

Petitioners' property is located in the area subject to the 2006 Damascus Master Plan. The Master Plan does not appear to address telecommunications facilities, as such, but Technical Staff's Vision Division pointed to two references in the Master Plan regarding the protection of rural vistas in connection with special exceptions (Exhibit 22, p. 4 and Attachment 9). The following language appears on page 11 of the Master Plan regarding land-use:

Special Exception Guideline for Rural Vista Protection

To ensure careful consideration of the long rural vistas that are a unique aspect of this community, this Plan strongly encourages the protection of the rural vistas that are intrinsic to the character of the Damascus vicinity. This is a town set on a hill, and the long vistas outside of the Town Center provide the most distinctive visual element for the community. Land uses that impede those vistas should be discouraged. Because of the uniqueness of the rural areas surrounding Damascus that are at the highest elevations in the County, this Plan recommends language in the Implementation Chapter to guide review of special exception uses proposed in the Transition and Rural Areas.

In the Implementation Chapter, on page 103 of the Master Plan, under the heading "Special Exception Guidelines" the following is stated:

Guideline for Rural Vista Protection – *The visual character of the Rural Areas surrounding Damascus are unique as they are the highest elevations in the County. When special exceptions are proposed in Transition and Rural Areas within the Damascus Master Plan area, their review should take into special consideration the preservation of these long vistas that are a part of the unique character of this community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose.*

Vision Division staff recommends approval of this petition, noting the following (Exhibit 22,

Attachment 9):

Based on [the Master Plan] language, the size of the parcel, the trees surrounding this unique parcel and the elevation of the site, allow the tower to be screened from the homes across the road. The proposed tower will be about the same height as the adjacent transmission towers. Because the transmission line towers carry 500kV, PEPCO prohibits commercial antennas to be located on top of the tower for the safety of their workers. The change in the visual appearance of the site will be minimal.

The Hearing Examiner agrees that the subject proposal will not offend either of the Master Plan guidelines. The proposed cell tower will serve an important public purpose, as will be discussed in the next section, and the visual impact of the proposed cell tower will be mitigated by its proximity to the existing Pepco transmission lines of similar height and the surrounding trees.

The property is zoned RDT, and Zoning Code §59-C-9.3(f) permits telecommunications facilities by special exception in the RDT Zone.

Based on this record, the Hearing Examiner concludes that the planned use is not inconsistent with the goals and objectives of the *Damascus Master Plan*.

E. Need for the Proposed Facility

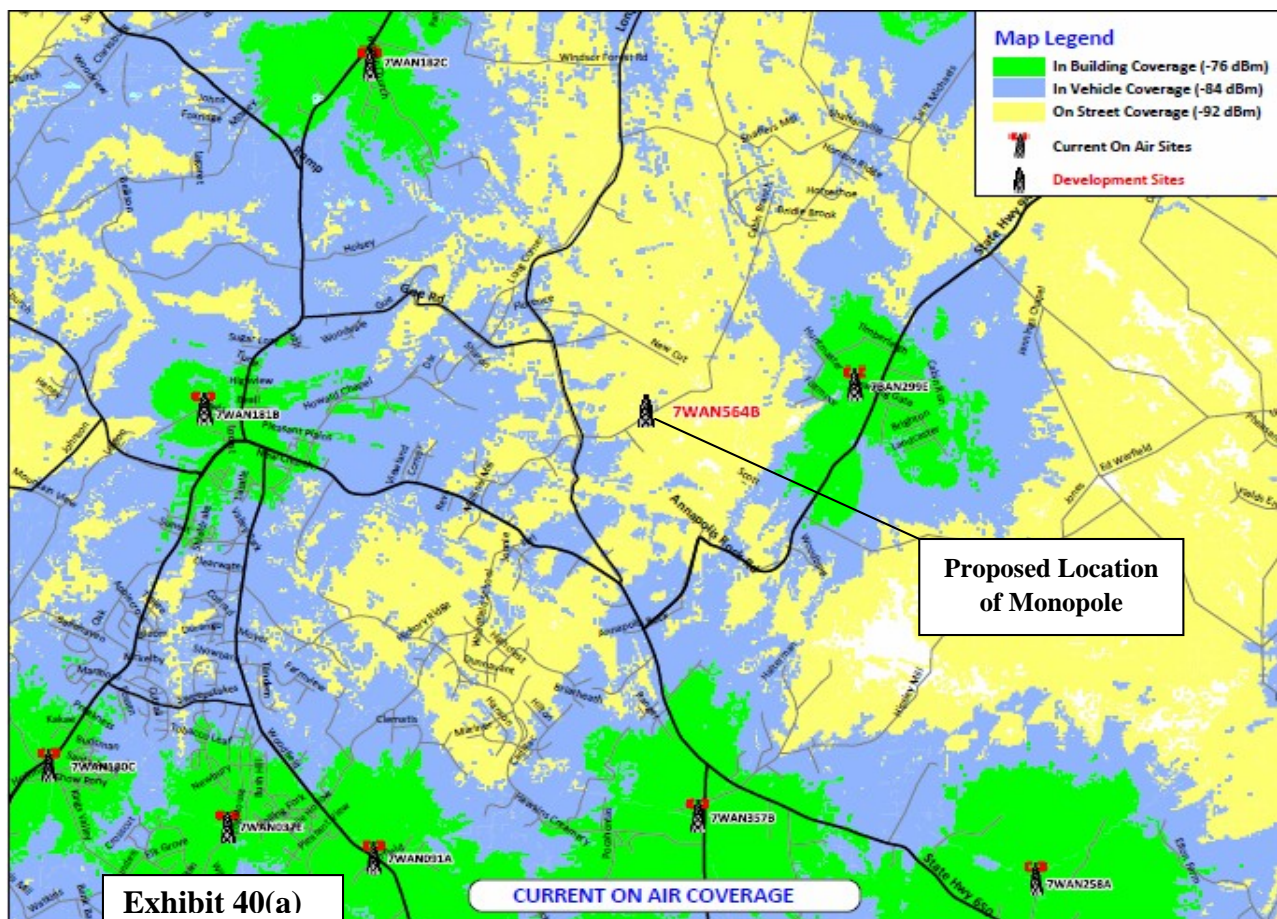
T-Mobile is proposing to locate a new telecommunications facility in order to fulfill its service requirements in this area. The Montgomery County Transmission Facility Coordinating Group (TFCG), after reviewing the revised application, determined that the applicants have a justified need for a new site at the proposed height of 150 feet and that there are not any existing structures in the vicinity that would meet T-Mobile's service need in the area. Exhibit 12. It thus recommended approval.

Even though this petition has been recommended by both the Transmission Facilities Coordinating Group and the Technical Staff, the Board of Appeals "must make a separate, independent finding as to need and location of the facility." Zoning Ordinance §59-G-2.58 (a)(12).

Petitioners presented evidence at the hearing as to both the need for, and the proper location of, the proposed telecommunications facility. That testimony came from T-Mobile's agent, Hillorie Morrison (Tr. 41-43), and from a T-Mobile radio frequency (RF) engineer, Curtis Jews. Tr. 68-81.

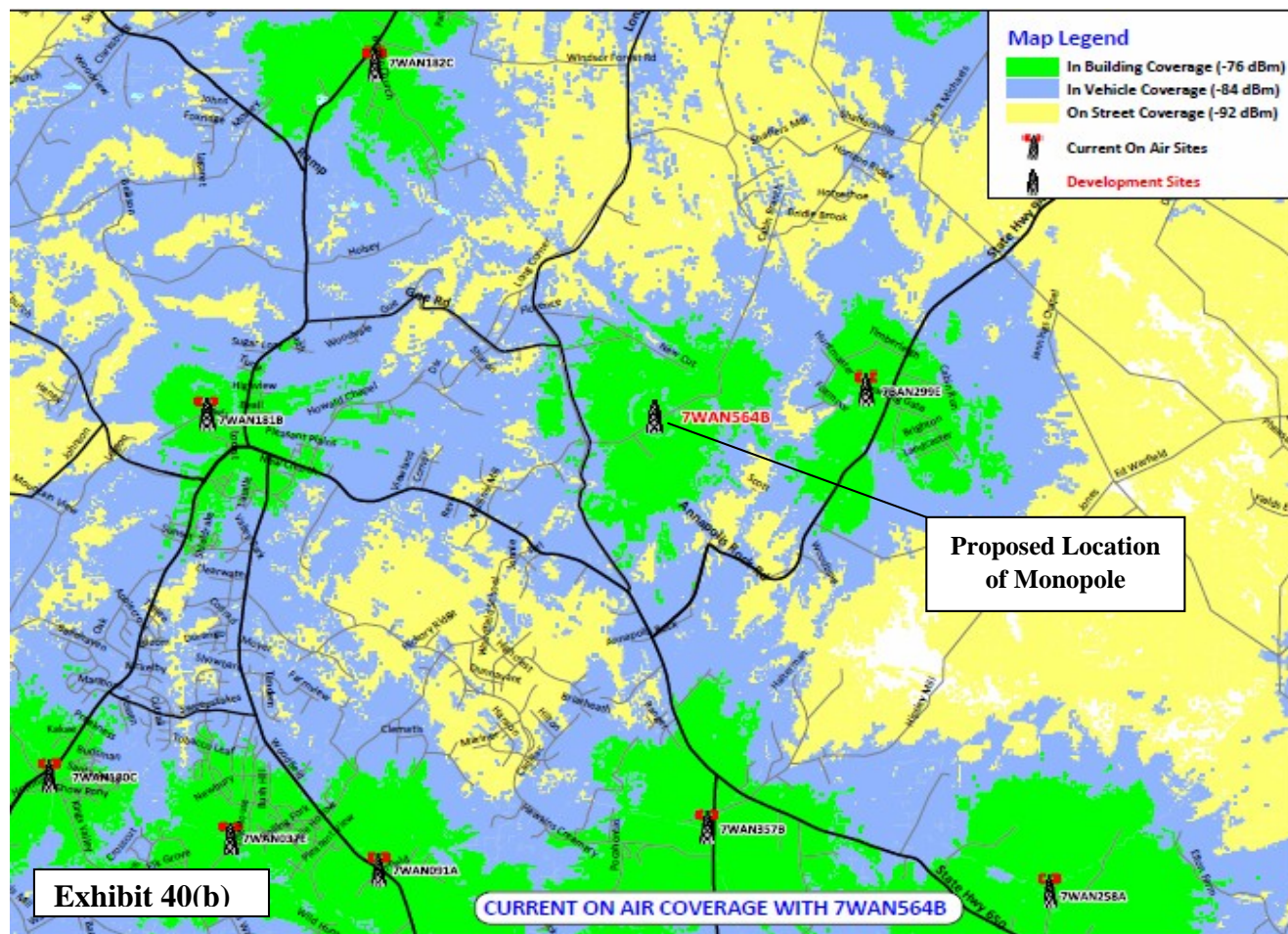
Curtis Jews, the RF lead engineer for T-Mobile, testified as an expert in Radio Frequency (RF) Engineering. Mr. Jews testified that the subject site is needed for a cell tower because of customer complaints about inadequate in-home coverage and dropped calls, and the need to improve current cell coverage in the area. T-Mobile's coverage goal is to provide better in-building coverage and to avoid dropped calls. T-Mobile is also providing "T-Mobile HotSpot," which allows customers to have a hub inside of their homes for wireless Internet service.

Mr. Jews introduced two coverage maps, Exhibit 40(a) showing current on-air coverage around the site and 40(b), showing expected on-air coverage with the proposed site, WAN-564, activated.



The color green depicts in-building coverage which is the coverage that one can expect inside of the home. Blue is in-vehicle coverage, and the yellow is the on-street coverage. As is apparent from Exhibit 40(a), there is currently a lack of in-building coverage in the area of the proposed cell tower – 7 WAN-564B.

Exhibit 40(b), depicted below, shows the expected coverage with 7 WAN-564B on air:



The expanded green area around the proposed cell tower demonstrates the improvement in in-building coverage. There is also an increase in the blue area, showing an expansion of in-vehicle coverage.

According to Mr. Jews, there are typically approximately 290,000 calls made from wireless homes to 9-1-1 across the country, and T-Mobile had a little over 27,000 9-1-1 calls collected at eight

nearby sites. In the same 12-month period for last year, from those eight surrounding sites, there were nearly 62,000 dropped calls. WAN-564 will aid in reducing that number of dropped calls.

Ms. Morrison (Tr. 41-43) testified that T-Mobile explored the possibility of locating its transmitters on top of the nearby Pepco power transmission line; however, that proved to be impossible because Pepco would not allow T-Mobile to mount its antennas at a height sufficient to fulfill the transmission needs of the facility. Pepco confirmed its position in an e-mail, which is in the record as Exhibit 31.

There is no evidence in the record to contradict the testimony of Ms. Morrison and Mr. Jews, and the Hearing Examiner credits that testimony as being accurate and persuasive. Based on that testimony and on the recommendation of the Transmission Facilities Coordinating Group and the Technical Staff, the Hearing Examiner finds that there is a need for proposed telecommunications facility, and that it is appropriately located.

III. SUMMARY OF HEARING

At the hearing, Petitioners called three witnesses, Michael McGarity, the civil engineer who helped design the plans for the site; Ms. Hillorie Morrison, a T-Mobile project manager, and Curtis Jews, a radio frequency engineer.

At the beginning of the hearing, the Hearing Examiner raised the question of whether the application was timely filed because the Tower Committee approved the matter on August 6, 2009, but the record indicated the special exception application wasn't filed until September 28, 2010. Zoning Ordinance 59-G-2.58(a)(11) requires such filing within one year after approval of the Tower Committee. Petitioners' position is that they filed this SE for the telecommunication facility on, and it was accepted on, August 5, 2010 (*i.e.*, within one year of tower committee approval). Tr. 7-11 and Exhibit 23.

The record was held open until February 7, 2011, so that Petitioners could file a minor revision to the Site Plan, altering the fence from a chain link to a board-on-board fence (Tr. 13), and resolve the issue regarding the date of filing.⁴

1. Michael McGarity (Tr. 16-38):

Michael McGarity, testified that he is the director of wireless services for Daft McCune Walker, an engineering and surveying consultant to T-Mobile. He has been working in the industry for 13 years and has worked on the design of over 1,000 cell tower sites. Mr. McGarity testified as an expert in telecommunications site design.

Mr. McGarity described the subject site and petitioner's proposal. The proposed tower is to be located on a large parcel (85½ acres) owned by the Wildlife Achievement Club. The majority of the property is wooded with different types of terrain. The access to the site will be off Mullinix Mill Road. There is an existing gravel access road that actually leads up to the Pepco right-of-way, where there are three existing Pepco transmission towers 200 to 300 feet northeast of the site.

There is an existing entrance off of Mullinix Mill Road. T-Mobile will be using that as their access to the proposed tower site. There will be an extension built off that existing drive to access the area where the proposed tower will be. The proposed tower site is in a partially cleared area, surrounded on all sides by mature trees.

The proposed tower compound would be 50 by 50 with a 150-foot monopole in the center of it. The Montgomery County zoning regulations state that a tower, in the RDT zone, must be set back from all property lines a distance of one foot for every height in a tower. So it's a one-to-one setback from the property lines, as well as 300 feet from any off-site dwelling.

In this particular instance, the setback requirements are met on three sides. It does not meet

⁴ The issue was ultimately cleared up by an e-mail from Katherine Freeman, Executive Director of the Board of Appeals, indicating that the Board of Appeals staff considered the application to be filed on August 5, 2010. Exhibit 42.

the setback requirement on the east side property line. But it is 313 feet from the nearest off-site dwelling. So that setback is met. It was not sited to meet the last setback to get it closer to the existing tree line for better screening purposes, as well as getting in closer to the existing transmission towers that are approximately 250 feet northeast of the site. Moreover, that location would require less disturbance of existing trees on the property in that vicinity.

Aerial photographs (Exhibit Nos. 26(a) and 26(b)) were introduced by Mr. McGarity. The red dot indicates the proposed location of the site. The access to Mullinix Mill Road is directly southwest of the red dot. There is a significant amount of tree cover and forested area.

Mr. McGarity also introduced photographs of the subject site. Exhibit Nos. 27(a)-(d). In exhibit 27(a), there is a stake in the far back with a yellow flag that shows exactly where the tower would be.

Exhibit 28 is a letter dated January 5, 2011, from the Wildlife Achievement Chapter, the current owner of the subject property, as well as the property which is adjacent to the east property line. Wildlife Achievement supports the placement of the pole at the proposed location, with the reduced setback.

According to Mr. McGarity, T-Mobile wishes to change the proposed fence from chain link to an 8 foot tall, board-on-board fence in order to improve screening.

2. Hillorie Morrison (Tr. 38-68):

Hillorie Morrison, works for Network Building and Consulting, and her firm acts as T-Mobile's agent for purposes of zoning. She testified that T-Mobile accepts and adopts the findings of the Technical Staff report. Tr. 39.

T-Mobile talked to Pepco about potentially co-locating its antennas below the Pepco lines very close to this proposed facility, but since this particular transmission line carries 500kV of power, they would not permit T-Mobile to locate antennas at the top of the pole.

Pepco did say Applicants could locate 20 feet below all the equipment that is on their poles, but that would only yield a 69 foot elevation, and that height would not meet T-Mobile's transmission coverage needs. Pepco's restriction is confirmed in an e-mail dated January 10, 2011 (Exhibit 31).

Ms. Morrison also introduced a January 22, 2010, report done by the Jeppesen Company that investigates whether the proposed telecom installation is in accordance with the FAA and FCC policies. Exhibit No. 32. Jeppesen concluded that FAA notice is not required, given the height of the tower, and that marking and lighting is also not required. There will be no lighting at all on the facility except an emergency light down near the ground, attached to one of the equipment cabinets for a technician to service it in the dark.

Ms. Morrison further testified that when T-Mobile erects a new monopole, it does a visual test, using a balloon (about two feet in diameter) raised to the height of the proposed monopole. Visibility is examined at various points around the site. T-Mobile then simulates what the actual monopole would look like based on the 150 foot height and the style of the pole, as shown in photographs. The location map marked "WAN-564" is Exhibit 33. WAN-564 pertains to this particular transmission tower. The red star in the center shows the location of the monopole based on its coordinates. The various blue dots show the point where Ms. Morrison stood to take the picture, and looking towards the site, underneath in red, it shows how far that point is from the site. These photographs depict the site as one would see it from the location that's indicated on the photograph. They all illustrate the same thing, that while the pole would not be invisible, because of the trees and because of the transmission towers that are already in the sight line, there is very little real change to the view.

Exhibit 35 shows the proposed site, the Wildlife Achievement Club, T-Mobile's WAN-564, and the closest cell sites surrounding it. A red flag marks WAN-564 because it is proposed, and

green flags mark the surrounding existing antenna sites. The closest site is 1.52 miles to the east, and that's at 3268 Woodbine Road. There will be later testimony from the radio frequency engineer with some propagation maps that will also show that there are some sites to the north and northeast that may not show up on this particular map. This Exhibit just shows the sites in Montgomery County. There others nearby in Howard County. All the remaining sites except for 3268 Woodbine Road are at least three miles away.

The Montgomery County Tower Committee reviewed this application and recommended approval from the technical standpoint. They recognized that there was a coverage need, and the requested height was appropriate in this case per their review.

Montgomery County Executive Regulation 1703 regulates using, processing, transferring, storing, or manufacturing of hazardous substances, including batteries, such as backup batteries used by T-Mobile and other carriers for these facilities. T-Mobile commits to file such registration for this site.

T-Mobile will use a NorthStar battery. Exhibit No. 36 is a fact sheet that describes the chemical safety information with regard to the radio base station cabinets used in T-Mobile sites. It states that T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. Throughout an extreme range of operating conditions, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment. The EPA classifies NorthStar NSB 100-FT battery as spill proof. Exhibit No. 37 is the specifications sheet for NorthStar batteries.

Exhibit 38 is an affidavit of January 12, 2011, from Jason Campbell who is the senior development manager of T-Mobile Northeast, LLC. He states that T-Mobile would install two

radio base station cabinets and related equipment at the facility. A third cabinet could be added in the future. T-Mobile will submit an application through Montgomery County to use the facility if the Wildlife Achievement Club site is approved.

Ms. Morrison further testified that the Technical Staff report correctly reviewed compliance with all of the general and specific requirements for the special exception. There is a 4 foot lightning rod on top of the 150 foot tower. Therefore, the requested setback waiver is for 77 feet, which is half of the required 154 foot setback.

Subdivision will not be required in this case. There will be a small sign identifying the site number and the tower owner information, as required by FCC. Petitioner agreed to the conditions which are usually imposed in cell tower special exception cases.

3. Curtis Jews (Tr. 68-81):

Curtis Jews testified as an expert in Radio Frequency (RF) Engineering for T-Mobile. Mr. Jews is the RF lead engineer for T-Mobile. He worked on this site for T-Mobile. Mr. Jews testified that the subject site is needed for a cell tower because of customer complaints and the need to improve current cell coverage in the area. T-Mobile's coverage goal is to provide contiguous in-building coverage and to provide coverage that will allow customers to have a call that is not interrupted by a dropped call. T-Mobile is also providing "T-Mobile HotSpot," so that customers can have a hub inside of their homes for wireless Internet service.

Mr. Jews also introduced two coverage maps, Exhibit 40(a) showing current on-air coverage around the site and 40(b), showing current on-air coverage with the proposed site, WAN-564, activated. Green is in-building coverage, which is the coverage that one can expect inside of the home. Blue is in-vehicle coverage, and the yellow is the on-street coverage.

At the subject site, 7 WAN-564B, there is currently a lack of in-building coverage. Mr. Jews did not do a drive study in this case, but relied on modeling software. Exhibit 40(b), showing

the expected coverage with 7 WAN-564B on air, there is an improvement in coverage. Where there was a lot of yellow, which is on street coverage, and blue, which is in vehicle, there now is in-building coverage, which is green, and more of the blue in-vehicle coverage. Thus, the new facility would fill in the gap.

Exhibit 10 shows some of the cell towers in Howard County labeled BAN-582, BAN-210. Even with those included, there is still a coverage gap. According to Mr. Jews, there are typically approximately 290,000 calls made from wireless homes to 9-1-1 across the country, and T-Mobile had a little over 27,000 9-1-1 calls collected at eight nearby sites. In that same 12-month period for last year, from those eight surrounding sites, there were nearly 62,000 dropped calls. WAN-564 will aid in reducing that number of dropped calls. T-Mobile commits to complying with FCC rules and its license regarding emissions in that they will be within the required FCC emissions.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 22).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the

general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff noted that height and visual impact "tend to be inherent adverse effects

commonly associated with telecommunications facilities...." Exhibit 22, p. W 5. The Hearing Examiner would list the following inherent physical and operational characteristics necessarily associated with a telecommunications facility use:

- (1) antennas installed on or within a support structure with a significant height;
- (2) a technical equipment area that may or may not be enclosed within a fence;
- (3) visual impacts associated with the height of the support structure;
- (4) radio frequency emissions;
- (5) a very small number of vehicular trips per month for maintenance; and
- (6) some form of back-up power.

The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. That is the case here, except that even the visual impact is small in this instance because the telecommunications facility will be set back far from the nearest dwelling; it will be sited nearby existing Pepco power transmission towers of similar height; and it will be adequately buffered by trees. There are no unusual, negative characteristics of the site.

For all the reasons discussed in Part II of this report, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the approval of the Transmission Facilities Coordinating Group, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: A telecommunications facility is a permissible special exception in the RDT Zone, pursuant to Code § 59-C-9.3(f).

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.58 for a telecommunications facility as outlined in Part C, below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioners' property is located in the area subject to the 2006 Damascus Master Plan. For the reasons set forth in Part II.D. of this report, the Hearing Examiner finds that the planned use is not inconsistent with the goals and objectives of the Damascus Master Plan.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed installation will be in harmony with the character of the neighborhood

because it will be barely visible from the adjacent community due to the large setbacks and buffers and its proximity to Pepco transmission lines of similar height. There will also be no significant impact on traffic or parking. The proposed use is a low intensity use, only requiring on-site personnel for emergency repairs and regularly scheduled maintenance visits once or twice a month. Technical Staff report (Exhibit 22, pp. 4-5).

Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for all the reasons stated immediately above, and those discussed in Part II.C. of this report.

Therefore, the Hearing Examiner finds that the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The tower will have no lights, and the equipment building will not be illuminated at night except when night-time servicing is required. Technical Staff found that the

special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Exhibit 22, p. 7.

Thus, the undisputed evidence supports the conclusion that the telecommunications facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed special exception use will not change the intensity of special exception uses in any substantial way. The only other special exception in the neighborhood is one that exists on the subject site, which allows the co-applicant, Wildlife Achievement Club, to operate a private club and skeet shooting range. Moreover, the proposed use is consistent with the Damascus Master Plan. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses in a way that will affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Moreover, the federal Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

Petitioners' radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license regarding radio frequency emissions. Tr. 81. Petitioners will also be required to comply with all applicable hazmat regulations governing the site. The Hearing Examiner therefore concludes that the proposed telecommunications facility will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Technical Staff did do such a review, and concluded that the proposed use would add no additional trips during the peak-hour weekday periods and only one or two service trips per month. Thus, the requirements of the LATR and PAMR are satisfied without a traffic study. By its nature, the site requires no school, water or sewer services. Technical Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards. Exhibit 22, Attachment 10.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Transportation Staff's conclusion that the proposed use "will have no adverse effect on area roadway[s]," the Hearing Examiner so finds. Exhibit 22, Attachment 10.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 22) and the conclusion of the Transmission Facilities Coordinating Group (Exhibit 12), provide sufficient evidence that the specific standards required by Section 59-G-2.58 are satisfied in this case, as described below.

Sec. 59-G-2.58. Telecommunication facility

(a) Any telecommunication facility must satisfy the following standards:

(1) A support structure must be set back from the property line as follows:

A. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.

B. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.

C. The setback from a property line is measured from the base of the support structure to the perimeter property line.

D. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Conclusion: Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the total height of 154 feet for the cell tower and lightning rod, a 154 foot setback from each property line is required. This setback is easily met on three sides: it is 236 feet from the southern property line; 1,466 feet from the western side property line; and 1,445 feet from the northern (rear) property line. However, the minimum setback will not be met on the eastern side.

Applicants are seeking a reduction of the setback requirements, pursuant to Section 59-G-2.58(a)(1)(D), to allow the cell tower to be erected 77 feet from the eastern property line, instead of the required 154 feet. As explained by Applicants, the cell tower was not sited to meet the eastern setback requirements for three reasons: to get it closer to the existing tree line for better screening purposes; to get it closer to the

existing transmission towers that are approximately 250 feet northeast of the site; and to reduce the disturbance of existing trees on the property in that vicinity. Tr. 23-24.

The Board of Appeals is authorized by Zoning Ordinance §59- G-2.58(a)(1)(D) to reduce the setback requirement to not less than the building setback of the applicable zone⁵ if the applicant requests a reduction; and “evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.”

Technical Staff supports the setback reduction because the proposed location of the monopole will help it blend in with the existing line of Pepco transmission towers adjacent to the property. As noted by Staff, “these site conditions make this location less visually obtrusive.” Exhibit 22, p. 9. In fact, the owner of the adjacent property to the east is the co-applicant, Wildlife Club, which indicated by letter (Exhibit 28) that it did not object to the reduced setback requested by T-Mobile.

Based on this record, the Hearing Examiner recommends that the Board of Appeals grant the requested reduction in the eastern setback to 77 feet.

(2) *A support structure must be set back from any off-site dwelling as follows:*

- A. *In agricultural and residential zones, a distance of 300 feet.*
- B. *In all other zones, one foot for every foot in height.*
- C. *The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*

D. *The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and*

⁵ The minimum side yard building setback in the RDT zone is 20 feet. Thus, the proposed 77 foot setback easily meets that minimum.

nearby residential properties, and visibility from the street.

Conclusion: The subject site is in an agricultural zone, so the 300 foot setback requirement applies. As shown in the Site Plan (Exhibit 44), the closest off-site dwelling is 313 feet to the south. Thus, the proposal is in compliance with this requirement.

(3) The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.

Conclusion: The support structure, including the lightning rod, will be 154 feet in height, and the antenna will be mounted at about the 147-foot level,. The antenna will reach up to a height of approximately 150 feet. Thus, the proposal meets the requirement of being under 155 feet. A condition has been proposed in Part V of this report to ensure compliance with the certification requirement.

(4) The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.

Conclusion: As discussed in Part II.C of this report, the proposal conforms to this requirement. In addition to the nearby trees and the nearby Pepco power lines, the compound will be surrounded by an 8 foot tall, board-on-board fence.

(5) *The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if:*

(A) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and

(B) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.

Conclusion: The property owner, the Wildlife Achievement Club Chapter of the Izaak Walton League of America, is a co-petitioner. The facility will be capable of supporting three telecommunications carriers. Exhibit 22, p. 2.

(6) *No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

Conclusion: No signs or illumination are proposed, except the two square foot sign required by subsection (8), below, and a light on the equipment shelter to be used if emergency repairs are required at night.

(7) *Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.*

Conclusion: Petitioners' site plan (Exhibit 44, Note 21) calls for removal by Petitioners if the facility is not used for more than one year, and a condition to that effect is recommended in Part V of this report.

(8) *All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The*

sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: The required sign will be installed (Exhibit 44, Note 23), and a condition so stating is recommended in Part V of this report.

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: Petitioners' site plan (Exhibit 44, Note 25) indicates that petitioners will maintain the facility in a safe condition, and a condition to this effect is recommended in Part V below.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than 90 days old, except that a recommendation issued within one year before June 22, 2010, must be accepted for one year from the date of issuance. The recommendation of the Transmission Facility Coordinating Group must be submitted to the Board at least 5 days before the date set for the public hearing.*

Conclusion: A recommendation of approval, dated August 6, 2009, was filed herein as Exhibit 12.

It was less than one year old when the petition was filed on August 5, 2010.

(12) *The Board must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.*

Conclusion: As noted, both the Transmission Facility Coordinating Group and the Technical Staff

recommended approval. The Hearing Examiner recommends that the Board make the finding that there is a need for the proposed telecommunications facility and that it will be appropriately located, based on the evidence set forth in Part II of this report.

(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities. As discussed above, the proposed use meets those standards.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: Technical Staff did not recommend any parking for the proposed facility because it will require only one or two service visits per month.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures,

including radio and T.V. broadcasting stations and telecommunication facilities.

Conclusion: No waiver is needed because the subject site is located on a large property, which has more than adequate frontage. In any event, the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of Section 59-G-1.21.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: According Technical Staff, the property is exempt from submitting a forest conservation plan (Exhibit 22, p. 5).

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: This section pertains only to sites in special protection areas, where water quality plans are required. This site is not within an SPA.

(f) Signs. The display of a sign must comply with Article 59-F.

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two square foot sign required by the special exception.

(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: Inapplicable. The subject site is in agricultural zone, not a residential zone.

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: Inapplicable. The subject site is in agricultural zone, not a residential zone.

Based on the testimony and evidence of record, I conclude that the telecommunications facility use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2780 for a special exception to construct and operate a telecommunications facility, including a 150-foot tall monopole topped by a 4 foot lightning rod, and related equipment, at 26430 Mullinix Road, Mt. Airy, Maryland, be GRANTED, and pursuant to Section 59-G-2.58(a)(1)(D), that the Board of Appeals should grant Applicants' request to reduce the required setback from the eastern property line from 154 feet to 77 feet, all with the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.
2. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must

certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.

3. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
4. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
5. There must be no outdoor storage of equipment, except equipment specified in the Site Plan.
6. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
7. The facility shall be available for co-location of up to three carriers.
8. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.
9. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
10. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: March 7, 2011

Respectfully submitted,

Martin L. Grossman
Hearing Examiner